St. Rita's Medical Center *and* National Union of Hospital and Health Care Employees, 1199H, RWDSU, AFL-CIO. Cases 8-CA-12446, 8-CA-12663, 8-CA-13020-1, 8-CA-13020-2, 8-CA-13033-1, 8-CA-13033-2, and 8-CA-13033-3

April 27, 1982

DECISION AND ORDER

BY MEMBERS FANNING, ZIMMERMAN, AND HUNTER

On September 9, 1980, Administrative Law Judge John C. Miller issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answer to the exceptions. On January 14, 1981, the Board issued an Order remanding the proceeding to the Administrative Law Judge for the purpose of preparing and issuing a Supplemental Decision. On September 9, 1981, Administrative Law Judge Miller issued the attached Supplemental Decision in this case. No exceptions were filed to the Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge in his Decision as modified by his Supplemental Decision and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: This case was heard before me in Lima, Ohio, on February 25-27, 1980. The consolidated complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended, by, *inter alia*, interrogating and threatening employees about their union activity; suspending an employee; denying another employee a raise; and changing an employee's working hours because of her union activities and support. The complaint further alleges that a prior settlement agreement was vacated and charges in Cases 8-CA-12446 and 8-CA-12663 were being reinstated because of Respondent's alleged conduct subsequent to the settlement agreement.

Counsel for the General Counsel (hereafter the General Counsel), the Charging Party, and Respondent, all filed briefs which have been duly considered. On the entire record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation located in Lima, Ohio, is engaged in providing health care on a nonprofit basis and is described as a general hospital. Annually, in the course of its business operations, it receives gross revenues in excess of $250,000 and receives goods valued in excess of $10,000 at its Lima, Ohio, facility directly from points located outside the State of Ohio. It is alleged and admitted and I therefore find that Respondent is a health care institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Union, the National Union of Hospital and Health Care Employees, 1199H, RWDSU, AFL-CIO, is alleged and admitted[1] to be a labor organization within the meaning of Section 2(5) of the Act, and I so find.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a nonprofit acute care general hospital located in Lima, Ohio, and operates 425 patient beds and has approximately 1,420 employees working in some 50 departments. Approximately 105 of such employees are supervisors within the meaning of the Act.

On June 22, 1979, the Union filed a representation petition and an election unit containing some 570 employees was established by the Regional Director for Region 8. No election has been conducted as the current charges and complaint are blocking such election and the Union has refused to waive the above conduct in order to proceed to an election.

The complaint further alleges, and it is not disputed, that on or about June 11, 1979, Respondent entered into a settlement agreement in Cases 8-CA-12446 and 8-CA-12663 stating that it would not interrogate or threaten their employees about their union activities nor in any like or related manner interfere with employees' rights to form or join labor organizations or otherwise engage in activities protected by Section 7 of the Act.

As a result of allegations concerning Respondent's conduct just prior to and subsequent to the execution of a settlement agreement on June 11, 1979, the Regional Director for Region 8 set aside the settlement agreement and issued this consolidated complaint. The allegations which allegedly warrant setting aside the settlement

[1] Respondent, in its answer to the complaint, originally denied that the Union was a labor organization. At the hearing, Respondent's counsel agreed to change its response and admit the allegation.

agreement are contained in paragraphs 12–E, 14, 15, and 17 and shall be disposed of first. If I find that no violations occurred subsequent to the settlement agreement, it will be unnecessary to consider the earlier allegations which were embraced within the settlement agreement and a proper remedy would be merely to reinstate the settlement agreement.

B. *The Post-Settlement Conduct*

1. Roberta Flores[2]

Allegations involving Roberta Flores are contained in paragraphs 12(E), 14, and 17 and are discussed separately hereafter.

(a) Paragraph 12(E) alleges that on or about June 26, 1979, Respondent created an impression of surveillance and/or interrogated an employee concerning her union activities by asking her why she was "hassling" her fellow employees about the Union. In this respect, Flores testified that on or about June 25, 1979, after returning from a 3-day suspension, she was called into the office of George Cosby, director of housekeeping for Respondent, and was asked why she was harassing people about the Union in the emergency room. Flores denied doing so.

In contrast thereto, Cosby denied calling her into the office subsequent to her suspension, or interrogating her about the Union. For reasons detailed hereafter, I conclude that Flores, who appeared vivacious, volatile, and vindictive, was not worthy of belief wherever her testimony was in conflict with other witnesses or was not corroborated by credible witnesses. I recommend the allegation in paragraph 12(E) be dismissed.

(b) Paragraph 14 of the complaint alleges that on or about June 18, 1979, and on or about June 20, Respondent, through its supervisor, Marsha Holmes, interrogated an employee (Flores) outside Respondent's facility, about her union activities and threatened her with reprisals.

Flores' version as to several background incidents was as follows. While handing out union leaflets on the morning of June 20, 1979, Marsha Holmes, a supervisor in housekeeping, approached her and asked her if she did not have anything better to do on her day off. Later that day in the hospital cafeteria, Flores was manning a table where union literature was maintained and Holmes went by and stuck out her tongue at Flores.

At or about 3:30 p.m. at the close of the day shift, Flores was again handing out union literature at the hospital's High Street entrance and, as Holmes departed the hospital, Flores approached her and asked her why she had degraded her in front of other employees in the cafeteria. Holmes initially had nothing to say, but as the conversation continued Holmes stated she was her supervisor and that she was going to break Flores. Flores denied uttering any obscenities and two other employees (Mullenax and Parker) who were distributing union literature with Flores denied hearing any obscenities exchanged. They did confirm, however, that Holmes stated she did not want to talk to Flores and kept on walking.

Marsha Holmes credibly testified that, as she was leaving the hospital, Flores approached her and said, "Hey bitch, I want to talk to you." Holmes replied she did not have time to talk and kept on walking and Flores then yelled, "you f—g bitch . . . we're going to win." Holmes' testimony was corroborated by employees Debbie Ayers and Rod Cameron who were exiting the hospital with Holmes at the same time. They too heard the same expletive uttered by Flores. I am satisfied that Flores was the aggressor with respect to the incident where Holmes was leaving the hospital, and that she did call Holmes a "f—g bitch" and that Flores' version varied substantially from the true events. Flores herself admitted following Holmes as she left the hospital and Mullenax and Parker, the "corroborating" witnesses for Flores, confirmed that Holmes was avoiding a confrontation with Flores and stated she had nothing to say to Flores. Accordingly, I credit Holmes, Ayers, and Cameron and do not credit Flores[3] and recommend this allegation be dismissed.

(c) Paragraph 17 of the complaint alleges that on or about June 22, 1979, Respondent suspended Roberta Flores for 3 days because Flores had joined, assisted, or favored the Union or engaged in other protected concerted activities.

On June 21, 1979, the day following the confrontation between Flores and Holmes outside the hospital, Flores was paged to go to Cosby's office where Holmes asked her to sign some reprimand papers which stated she had acted disrespectfully toward her supervisor. Flores refused to sign the papers calling them "dog-faced lies" and ended up in Cosby's office where she continued to refuse to sign the papers. Holmes again asked her to sign the papers and Flores refused. The only factual dispute about this incident is whether and to what extent Flores became loud, threatening, and abusive. Holmes and Cosby credibly testified that Flores became loud, threatened "to get" Holmes, and that, when she refused to quiet down or leave, Holmes was forced to call security. After Holmes called security, Flores, still complaining in a loud voice, left the room to go punch out. Even Flores acknowledged that a security guard came up to her as she was punching out and asked what was the matter. In this context, it is clear that Holmes would not have called security merely because Flores refused to sign her reprimand papers. Moreover, several other employees in the office credibly testified that Flores became loud and abusive and threatened to "get" Holmes.[4]

[2] Roberta Flores married subsequent to the events involving her and is also referred to in the record as McLean or Roberta Flores McLean. Since she was known as Flores while employed by Respondent and for purposes of uniformity, she will be referred to herein as Flores or Roberta Flores.

[3] I cannot credit Flores because her testimony was inconsistent, was unsupported by other credible testimony, and was overwhelmingly rebutted by credible testimony of other employees. Although Flores was allegedly interrogated by Holmes, Mullenax and Parker, witnesses for the General Counsel, stated that Holmes did not want to talk to Flores and attempted to avoid her. With respect to allegations regarding her suspension (par. 17 of complaint), Flores denied being loud or threatening yet admitted that security was called. In her testimony Flores appeared to tailor her testimony to reflect discredit upon Holmes and Respondent and in the process exhibited her bias.

[4] Employees Hogan, Evans, and Cameron corroborated the testimony of Supervisors Holmes, Binkley, and Cosby.

After that incident, Holmes and Cosby, after consulting with Andrews, the assistant administrator of the hospital, decided that Flores needed additional disciplining for her loud and threatening conduct in the office, and Flores received a 3-day suspension. It is the suspension which is alleged to be discriminatorily motivated.

Since I have found that the preliminary incidents, namely, Flores calling Holmes a "bitch" and then being loud and threatening towards Holmes when she received a reprimand, did in fact occur as Holmes, Cosby, and several other credible witnesses testified, I find that Flores' reprimand and suspension were warranted and were prompted by her improper conduct towards Holmes and Cosby, and not by her union activities. Accordingly, I recommend this allegation be dismissed.

2. Walter Mae Clark

Paragraph 15 of the complaint alleges that Thomas Eisert, director of materials management, restrained and coerced an employee by telling her that, if the Union got voted in and employees found that the Union could not fulfill its promises, the Union could not be voted out.

Clark credibly testified that Tom Eisert, an admitted supervisor, called her into the breakroom on or about June 8, 1979, and gave her a union leaflet to read and asked her to feel free to ask him questions about it. He then stated that "after the union got in, if it didn't meet up to our expectations, we couldn't vote it out." She responded that they did not want to vote it out.

Eisert testified that, while he could not recall his specific conversation with Clark, he did meet with the laundry employees generally in discussions about the Union. He denied that he would have made the statement that the Union could not be voted out because he was aware that there are decertification procedures which permit employees to vote out a union. Clark's recollection was specific as compared to Eisert's general denial and I credit it.

The statement is, of course, not completely true. It is true that, once a union is voted in, it is deemed to be the bargaining representative for a reasonable period of time, i.e., at least 1 year, and no decertification petition will be entertained by the Board absent unusual circumstances. If a contract is reached by the parties that too would block a decertification petition for the duration of the contract, not exceeding 3 years. The question remains, however, whether that statement amounts to a threat or promise of benefit that is violative of Section 8(a)(1). I conclude that the misstatement of the law is not so blatant as to constitute a *per se* violation of the Act.[5] In any event, since only 1 of approximately 28 laundry employees so testified, the violation, if there is one, would be isolated and *de minimis*. Therefore, under either alternative, I would find the conduct, standing alone, insufficient to warrant setting aside the settlement agreement. Accordingly, I shall dismiss this allegation.

While paragraph 21 of the complaint sets forth that the withdrawal of the settlement agreement was prompted by the conduct alleged in paragraphs 12(E), 14, 15, and 17 which have been discussed and disposed of previously, the General Counsel amended the complaint at the hearing to add an additional allegation to paragraph 13 of the complaint, as 13(A) and (B). While the conduct allegedly occurred on or about June 1, 1979, which was prior to the execution of the settlement agreement on June 11, 1979, it is probable that such conduct was not known at that time in view of the General Counsel's late amendment of the complaint. Assuming that such alleged conduct, if found, might warrant setting aside the settlement agreement, I conclude it is necessary to consider the evidence as to such allegations.

3. Debbie Fama

Paragraph 13(A) alleges that on or about June 1, 1979, an employee (Fama) was told by Carole Ungerer, dietary supervisor, that if she changed her attitude as to her union sympathies, Respondent would probably be able to help her. Paragraph 13(B) alleges that Kay Wellman, manager, department of human resources, stated that if an employee (Fama) changed her attitude toward her union activity, Respondent would probably be able to help her. However, Fama's own testimony indicates that, in a discussion with Ungerer and Behnke about her late shift schedule, Ungerer asked her if she had any friends who could take her son, regarding her babysitting problems, and Fama said no. Then Ungerer said "if your attitude and opinion were changed maybe you would have *more friends* that would help you. . . . she just told me that my attitude, in words or less, stunk and my opinions were strong willed. And that, you know nobody would want to help me the way that my attitude was."

Fama testified similarly that when she left Behnke's office she went to see Kay Wellman and related her work schedule problems to her. Fama then stated, "And she listened to me and then she turned around and said that, it just seems to be your attitude. If you change your attitude and your opinions, people would help you."

My observation of Fama indicated that she was high-strung, and somewhat temperamental and beset with personal problems that affected her day-to-day relationships with people. She did not hesitate to voice her opinion and complain if things did not meet with her satisfaction. I am satisfied that the comments were directed at her attitude on the job and her relationships with people and were not directed at her union activities. Fama had been active on behalf of the Union since October 1978, and had advised Behnke that she was very active on behalf of the Union in January 1979. Yet she was given a job in April 1979 as a dietary hostess and Wellman assisted her in her grievance to get such job and in her babysitting problems. Moreover, the testimony quoted above relates to *other people* helping her, not Respondent.[6] In such circumstances, I find the allegations about comments on her "attitude" did not in fact relate to her union activities.

[5] Cf. *Sinclair & Rush, Inc.*, 185 NLRB 25 (1970); *The May Department Stores Company, d/b/a Famous-Barr Company*, 174 NLRB 770 (1969).

[6] Fama acknowledged in her testimony that Wellman assisted in her babysitting problem stating "she gave me several ideas and told me to ask the people in my department and I did. In fact, my son spent many a day going from one person to another that I worked with in order for me to keep my job."

Accordingly, I recommend these allegations be dismissed.

Summary

I have carefully reviewed the evidence relating to allegations which were the basis for setting aside the settlement agreement, namely, those allegations contained in paragraphs 12(E), 13(A) and (B), 14, 15, and 17 which involved employees Roberta Flores, Walter Mae Clark, and Debbie Fama and I have found insufficient credible evidence to support such allegations and I shall recommend their dismissal.

In view of my disposition of the post-settlement allegations, I find it unnecessary to consider on the merits the presettlement allegations since it is appropriate under the circumstances to reinstate the settlement agreement. Accordingly, I shall reconmend dismissal of relevant portions of the complaint and the reinstatement of the settlement agreement.

ORDER[7]

The complaint, insofar as it alleges post-settlement violations of the Act by the Respondent, is hereby dismissed.

IT IS FURTHER ORDERED that the settlement agreement in Cases 8-CA-12446 and 8-CA-12663 approved by the Regional Director for Region 8 on or about June 13, 1979, be and it hereby is, reinstated.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOHN C. MILLER, Administrative Law Judge: On February 25-27, 1980, a hearing was held before me in Lima, Ohio, upon the consolidated complaint in the above-entitled proceeding. On September 9, 1980, I issued my Decision, in which I concluded that Respondent had not violated the Act by certain conduct which postdated a settlement agreement entered into by the parties. At that time, I found it unneccessary to consider the merits of the presettlement allegations contained in paragraphs 16(A) and (B) and paragraph 18 of the complaint since I recommended reinstatement of the settlement agreement. Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions, and Respondent filed a brief in reply to the exceptions. On January 14, 1981, the Board ordered that this case be remanded to me for the purpose of preparing and issuing a Supplemental Decision applying the principles of *Steves Sash & Door Company*, 164 NLRB 468, 473 (1967), to the allegations contained in the above-mentioned paragraphs of the complaint. In *Steves Sash & Door*, the Board adopted Trial Examiner Klein's Decision which, in pertinent part, resolved allegations of violations of the Act which predated a Board-approved settlement agreement. In so resolving these allegations, Klein set forth the following:

> [T]he Board decisions establish the principle that a settlement, if complied with, will be held to bar subsequent litigation of all prior violations (*Jackson Manufacturing Company*, 129 NLRB 460), except to the extent that they were not known to the General Counsel or readily discoverable by investigation (*Neuhoff Bros., supra* [159 NLRB 1710 (1966)]) or were specifically reserved from the settlement by mutual understanding of the parties (*Tompkins Motor Lines, supra* [142 NLRB 1 (1963)]; cf. *United Dairy Co.*, 146 NLRB 187, 188-189).

The charge in Case 8-CA-13020-2 herein, pertaining to the allegations in paragraphs 16(A) and (B) and paragraph 18 of the complaint, was filed on July 23, 1979. However, the settlement agreement was executed on June 11, 1979. In keeping with the above-cited principles from *Steves Sash & Door*, I find that although the allegations herein are based on conduct occurring on June 5, 1979, before the settlement agreement was executed the allegations "were not known to the General Counsel or readily discoverable by investigation." Therefore, litigation of these alleged violations is not barred by the settlement agreement and they will be addressed and resolved hereafter.

On the entire record in this case, including the briefs of the parties, and my observation of the witnesses and their demeanor, I make the following findings.

Unfair Labor Practices

The complaint alleges that Patricia Brown was threatened that her wage increase would be withheld due to her union activity (par. 16(A) of the complaint); that she was interrogated about her union activity (par. 16(B) of the complaint); and that her wage increase was in fact withheld for unlawful reasons (par. 18 cf the complaint).

A. *Threat and Withholding of Raise*

Patricia Brown, an X-ray aide or transporter with Respondent for the past 6 years, was an active union supporter who passed out leaflets, wore a committee button, and attended union meetings. Her immediate supervisor was Pat Wittwer, section chief of radiology, who reported directly to Fred Pepple, head of the radiology department. In December 1978, Brown incurred injuries in an auto accident causing her to be out of work from December 1978 until early April 1979.

Three X-ray aides, Butler, Achrock, and Hollander, testified credibly that, sometime in the beginning of May 1979, they had complained to Wittwer that Brown was not doing her share of the work. Three X-ray technicians, Verhoff, Hammell, and Miller, testified credibly that, in a departmental meeting held by Pepple in May 1979, they had also complained about Brown's work habits.

These complaints centered on the fact that, when Brown brought a patient to radiology, she then went to

the lounge and waited for the same patient to be returned. The record indicates that other transporters had been instructed to return the first patient finished with their treatment and not wait for the same patient. The record establishes that the procedures for returning patients were changed while Brown was out of work due to her injury, and apparently Brown had never been told of the change.[1]

Wittwer referred the aides' complaints to Pepple. Pepple testified credibly that, since he had never before dealt with any disciplinary problems,[2] he discussed the complaints about Brown with Assistant Administrator Jack Sherger. Pepple further testified that he was advised by Sherger to utilize the new performance review policy with respect to Brown and to withhold Brown's wage increase for 30 days, pending her improved performance.

On June 5, 1979, Brown was called into a meeting in Wittwer's office to discuss her evaluation. Present were Brown, Wittwer, and Pepple. Both Wittwer and Pepple testified credibly that Brown was informed that, due to complaints from some coworkers, her wage increase would be withheld for 30 days, at which time she would be reevaluated. If her performance improved and things were satisfactory, she would get her increase at that time.

Wittwer testified that, due to her observations of Brown's work, she noticed a marked improvement within the 30-day period and that Brown's coworkers told Wittwer that Brown's work performance had improved. Thus, on July 14, 1979, Brown received her raise.

The evidence is overwhelming that fellow employees had made complaints about Brown and that Fepple was advised by Sherger, the assistant administrator of the hospital, to utilize the new performance review policy to deal with the problem. Accordingly, I find that the threat to withhold Brown's raise and its actual withholding were prompted by Brown's failure to follow existing work procedures and was not motivated by her union activity. I recommend dismissal of these allegations.

B. *Interrogation*

There remains for consideration whether Brown was interrogated about her union activities at the June 5, 1979, meeting with Wittwer and Pepple. Wittwer explained what the problem was with Brown's work and what action was being taken. At one point, Pepple commented that her "outside activities" might be interfering with her work. Brown responded that her only outside activities were her union activities and, according to Brown, Wittwer asked her what good a union would do her at her age. Both Pepple and Wittwer denied that Wittwer made such a comment. Pepple explained credibly that his reference to "outside activities" referred to Brown's daughter whom he knew had a long-term illness and has had past periods of hospitalization.

As Brown was a somewhat older woman, it is logical that a statement, such as how can the union help her at her age, was made. To this extent I credit Brown. There remains for resolution whether this single comment in response to Brown's statement about the Union amounts to unlawful interrogation. As Brown admitted that she was the first one to raise the subject of the union or her union activities at the meeting and the comment was isolated or *de minimis*, I find that it did not amount to unlawful interrogation in this context. Accordingly, I find that Brown was not unlawfully interrogated and recommend dismissal of this allegation.

Conclusion

I have carefully reviewed the evidence relating to the allegations contained in paragraphs 16 (A) and (B) and paragraph 18 of the complaint, involving employee Patricia Brown, and have found insufficient credible evidence to support such allegations. I, therefore, recommend the dismissal of these allegations.

ORDER[3]

It is hereby ordered that the allegations contained in paragraphs 16(A) and (B) and paragraph 18 of the complaint be, and they hereby are, dismissed.

---

[1] Butler, Schock, and Hollander all began work in X-ray during December 1978, when Brown was out of work. They all testified that they had been trained in the new procedure and apparently they were not aware of the old procedure.

[2] Pepple began as head of Respondent radiology department in January 1979.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.